BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ERIC VON KESSLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,895
MULTI CHEM GROUP	)	
Respondent	)	
AND	)	
	)	
ZURICH NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the April 10, 2009, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on August 5, 2009.

APPEARANCES

John E. McKay of Kansas City, Missouri, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.[1] In addition, at oral argument before the Board the parties stipulated claimant had a 25 percent whole person impairment before May 11, 2007, for purposes of K.S.A. 44-501(c).

[1] The correct date of claimant's deposition is February 21, 2008. Also, respondent did not stipulate that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

ISSUES

Claimant alleges he injured his back from the cumulative trauma he sustained working for respondent and driving its oil field treater truck from approximately February 15, 2007, through May 11, 2007. In the April 10, 2009, Award, Judge Klein awarded claimant permanent partial disability benefits for a 56.6 percent work disability,[2] which represented a 60.2 percent wage loss and a 53 percent task loss.

Respondent argues: (1) claimant did not permanently injure or aggravate his back working for respondent; (2) claimant's conduct and termination from respondent's employment limits any award of permanent partial disability benefits to his functional impairment rating, (3) any task loss analysis should exclude the tasks that were lost due to an earlier back injury; and (4) any award for a permanent partial disability should be reduced by claimant's preexisting 25 percent whole person impairment.

Conversely, claimant argues he sustained an additional five percent whole person impairment and a 60.6 percent work disability (60.2 percent actual wage loss and 61 percent task loss) due to the injury he sustained while working for respondent. He also argues that despite an earlier two-level spinal fusion his task loss should be determined considering all of the work tasks that he performed in the 15-year period before his accident as set forth in K.S.A. 44-510e. Claimant asserts that following that earlier surgery, which was performed in August 2002, he returned to work in the oil fields and performed heavy manual labor. Moreover, claimant maintains the restrictions he was given following his 2002 fusion ended after six months. Finally, claimant suggests his most recent low back injury is at a different level than those fused in 2002 and, therefore, his award should not be reduced by his preexisting 25 percent whole person impairment rating.

The issues before the Board on this appeal are:

1. Did claimant permanently injure or aggravate his back working for respondent and driving its treater truck on a full-time basis from approximately February 15 through May 11, 2007?

2. If so, what is the nature and extent of claimant's injury and disability? And in the event claimant qualifies to receive a work disability, should any of claimant's former work tasks be excluded when determining task loss in the permanent partial disability formula of K.S.A. 44-510e?

[2] A permanent partial disability under K.S.A. 44-510e greater than the whole person functional impairment rating.

3. If claimant is entitled to receive permanent disability benefits, should the award be reduced under K.S.A. 44-501(c) by the preexisting 25 percent whole person impairment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent primarily services gas wells. In June 2006, claimant began working for respondent as a field technician. Despite a two-level low back fusion at L4-5 and L5-S1 in 2002, claimant's back was relatively symptom-free. At that time his only symptoms were minor morning stiffness and pain, which resolved after an hour or two. Claimant recovered from his 2002 back surgery and returned to performing heavy manual labor. In the 2½ years before commencing work for respondent, claimant neither sought medical treatment nor took medications for his low back. Before commencing work for respondent, claimant passed a DOT medical examination, which respondent had him take.

Claimant worked for respondent without incident until sometime in February 2007, when he began having low back symptoms that he attributed to driving a treater truck on a more consistent basis. The treater truck carried chemicals and water that was used to treat the gas wells to prevent corrosion and scale. The truck was approximately 30 feet long and carried six 55-gallon chemical tanks and a water tank. The truck's first step was approximately three feet above the ground. The hoses used to pump chemicals into the wells were 4 inches in diameter and from 4 to 20 feet long. The truck jarred claimant as he drove through the fields to the wells.

Claimant estimated he treated approximately 40 wells per day, which required opening and closing an average of three gates per well. Consequently, for each well claimant had to climb in and out of the truck numerous times. All told, claimant would potentially climb in and out of the treater truck thousands of times per week.[3] The job also required claimant to remove the bull plugs from the wells. Oftentimes, the plugs would have rusted over from the salt water from the well and would be very difficult to remove. Many times claimant would have to use his entire body weight to loosen the plugs. The job required claimant to bend and stoop often as many of the plugs were located only inches above the ground.

Initially claimant drove the treater truck on an intermittent basis. But when one of respondent's biggest clients in Southeast Kansas decided it would begin treating all of its

[3] R.H. Trans. at 56, 57.

approximately 500 wells in Southeast Kansas, the treater truck was needed on a full-time basis. In addition, that client was drilling between 20 and 30 new wells each month in that area. Being one of two employees in Southeast Kansas, claimant was assigned the treater truck. The quantity of work often required claimant to work long days and seven days per week. After several weeks working full-time on the treater truck, claimant experienced significant low back pain and shooting pains down through his hips. As he continued to drive the truck his symptoms worsened to where he had burning low back pain and pain shooting into his legs, which affected his ability to sleep and his ability to walk. In the 2½ years before commencing work for respondent, claimant had not experienced any burning pain in either his low back or hip. Because of his worsening symptoms, claimant began taking medications.

Claimant advised his immediate supervisor, Rolla (Chigger) Cosner, that driving the treater truck was hurting him. Mr. Cosner agrees claimant reported this around mid-February 2007. Mr. Cosner also indicates claimant's back complaints increased the more he operated the treater truck. Claimant also advised respondent's area supervisor, Mark Erpelding, about his back symptoms. Both Mr. Cosner and Mr. Erpelding deny telling claimant that he needed to "tough it out." Mr. Cosner, however, explained that he told claimant that respondent would hire someone to operate the treater truck and that claimant would be promoted. Mr. Cosner testified that claimant continuously brought up the fact his back was hurting but Mr. Cosner did not believe him because claimant allegedly jumped dirt on a four-wheeler and allegedly invited Mr. Cosner to the lake to water ski.

Claimant eventually contacted Mr. Cosner's supervisor, Mr. Erpelding, and reported his back complaints. Shortly afterward respondent referred claimant for medical treatment at the Coffeyville Doctors Clinic. On April 18, 2007, claimant saw Dawn McCaffrey, a nurse practitioner, who noted that claimant had back spasms and told claimant to stay out of the treater truck. Claimant was restricted, among other activities, from lifting more than 20 to 25 pounds, climbing, bending and reaching below the waist and pulling using his body weight. He was prescribed medications and, because of the increasing pain down into his legs, told to see a neurosurgeon.

Instead of seeing a neurosurgeon, on April 30, 2007, claimant returned to the orthopedic surgeon who performed his 2002 two-level spinal fusion, Dr. Michael L. Smith. The doctor, who had not seen claimant since February 2003, testified that at their April 2007 visit claimant was complaining of back and leg symptoms that he had been experiencing for about three months. Dr. Smith ordered an MRI and it showed a bulging disc between the L3 and 4 vertebrae and minimal posterior subluxation of L3 on L4. The doctor, however, was unable to say whether those were new findings. In any event, Dr. Smith opined that claimant's symptoms were most likely secondary to his underlying degenerative disc disease rather than due to anything that happened at work.

At the April 2007 examination, Dr. Smith restricted claimant from driving, or riding in, the treater truck. The doctor testified that he restricted claimant in February 2003 from lifting more than 20 pounds, along with restricting claimant to whatever bending and walking claimant could tolerate. Although the doctor testified those restrictions were listed as permanent, the doctor also stated that permanency is a difficult concept as it is not uncommon for him to modify the restrictions that he gives patients. For example, the doctor sometimes alters restrictions when a patient requests or when a patient is able to tolerate more and the patient's subjective complaints change. The doctor testified, in part:

> The last note that I have is from 2/21/03 where we listed his restrictions of lifting at 20 pounds and bending and walking as tolerated. I don't have any other form.
>
> . . . .
>
> I listed [his restrictions] as permanent, but permanent is a difficult concept, it seems. We do get a lot of calls from patients who say, "Hey," you know, "I had these permanent restrictions but now I'm doing a lot better and would you remove those permanent restrictions." Sometimes we do, yeah.[4]
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> . . . .
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> Well, the restrictions were given at six months, like you said, and sometimes people slowly improve as time goes on. A lot of people come back and say, you know, it took a year or longer for things to really heal and settle down.[5]

The restrictions Dr. Smith gave claimant in 2003 were likely based upon what claimant subjectively believed he could do.[6] Moreover, the doctor testified claimant's 2002 back surgery did not indicate that claimant could not perform the work of bending over and removing a stubborn bull plug as the doctor noted that there are many people who return to heavy manual labor after back surgery.[7]

After seeing Dr. Smith and being restricted from driving the treater truck, claimant returned to work for respondent performing filing in respondent's Cleveland, Oklahoma,

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[4] Smith Depo. at 21, 22.

[5] *Id.*, at 43.

[6] *Id.*, at 45.

[7] *Id.*, at 63.

office. Respondent terminated claimant on May 15, 2007.[8] Mr. Erpelding contends claimant had an attitude problem and that he was terminated due to his earlier job performance. Claimant admits he became angry with Mr. Erpelding when they discussed claimant's back symptoms and was told to "tough it out." Mr. Cosner testified claimant was fired after he and Mr. Erpelding determined they did not have work within claimant's restrictions.[9] Mr. Cosner also testified that claimant had a host of job performance issues. It is noteworthy, however, that claimant was not disciplined for his job performance until after claiming he had injured his back at work and requesting medical treatment.

At his attorney's request, claimant was examined by Dr. P. Brent Koprivica, whose practice primarily consists of providing medical evaluations on behalf of claimants.[10] The doctor is board-certified in emergency medicine and occupational medicine and is a fellow of the American Academy of Disability Evaluating Physicians. Dr. Koprivica examined claimant on December 18, 2007, and July 3, 2008, and concluded the work claimant performed for respondent from February 15, 2007, through the end of his employment in May 2007 permanently aggravated his back. The doctor testified, in part:

> What he was doing was he was climbing in and out of a truck about four feet. It's not like getting into a car. There is climbing that stresses the back. He has whole body jarring from operating the truck off road because he's going around oil wells. It's a heavy truck so there's going to be more jarring in that situation than you would in a normal automobile.
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> And then he's doing bending and forceful activities which have been shown to biomechanically stress the back. Associated with that he developed pain.
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> Now, that pain arose from the degenerative disease becoming worse, which means it's aggravated. The degeneration is increased by placing those types of biomechanical stresses so it's accelerated, and then once it's symptomatic, the pain became worse even after he has had that aggravation which is intensifying those symptoms and it has been a permanent change because he has avoided those exposures, and even with avoidance they've persisted since that time. So that was the reason I came to those conclusions.[11]

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[8] R.H. Trans. at 74.

[9] Cosner Depo. at 32.

[10] Koprivica Depo.(Dec. 1, 2008) at 28.

[11] *Id.*, at 19, 20.

Dr. Koprivica determined claimant had a preexisting impairment of 25 percent and that he sustained an additional five percent whole person impairment under the AMA *Guides*[12] due to the aggravation he sustained working for respondent.[13] The doctor arrived at that percentage by concluding claimant's symptoms fell within DRE (Diagnosis-Related Estimates) Category II under the injury model of the *Guides*.

At his December 2008 regular hearing, claimant testified he continued to experience pain and stiffness in his back and hips, which, if he did anything, would reach a 5 or 6 out of a maximum of 10.[14] He also testified that he now experiences occasional stabbing pain, and some degree of pain or stiffness all day long rather than just the 1 or 2 hours of minor pain and stiffness he experienced before working for respondent. In addition, he now sleeps only 4 to 6 hours a night due to his pain and occasionally takes pain medications. Claimant also testified that now he can only drive for 30 minutes before he is in trouble whereas before driving the treater truck full-time for respondent he could drive from 1 to 3 hours before starting to hurt. Comparing his present symptoms to those he had before commencing work for respondent, claimant testified:

> Q. (Mr. Cunningham) Since your employment ended with Multi Chem [respondent] in May of 2007, I realize you had this little flare-up when you lifted the Christmas tree. But overall, has your condition gotten better, gotten worse or stayed the same?
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> A. (Claimant) Stayed the same. But I'm just not in that constant pain level like when I was in the truck. Of course, I just couldn't breathe or function. Now I just got that where I can tell I ain't quite where I was. Honest to truth, I just ain't right where I was before I worked for Multi Chem. I can't quite do as much as I used to be able to do and feel pain free. Before Multi Chem I'd do whatever I wanted to do. And that's what I told them, I could do whatever I wanted. And now I just don't feel like I can.[15]

The majority of the Board finds claimant sustained additional back injury due to the work he performed for respondent. Claimant's back is now much more symptomatic than before he began driving the treater truck on a more regular basis. Even Dr. Smith acknowledged that claimant was experiencing low back complaints in April 2007 that were

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[12] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[13] Koprivica Depo.(Dec. 1, 2008) at 21.

[14] R.H. Trans. at 82.

[15] *Id.*, at 111, 112.

more significant than in 2003 when he released claimant from treatment. Nonetheless, the majority is unconvinced that Dr. Koprivica properly utilized the *Guides* in rating claimant's back as required by K.S.A. 44-510e. Dr. Koprivica did not indicate claimant's present injury is at a different level from where he was previously operated. Moreover, Dr. Koprivica acknowledged that claimant fell in DRE Lumbosacral Category V due to his earlier injury and back fusion, and the low back injury claimant sustained working for respondent did not push him into Category VI, which requires cauda equina complaints.[16] Accordingly, the Board finds claimant has failed to quantify the amount of additional impairment he has sustained from working for respondent.

Task loss

Claimant did, however, prove that he has sustained a loss of ability to perform his former work tasks due to the injury he sustained working for respondent. First, claimant's belief that Dr. Smith had told him he could perform work as tolerated is reasonable in light of the doctor's testimony that he restricted patients based upon their subjective complaints and that, in essence, it was not uncommon for him to modify a patient's restrictions upon request or a change in subjective complaints. Although claimant had a two-level spinal fusion in 2002, he returned to the labor force and performed heavy manual labor. Therefore, claimant's task loss should be determined considering all of the work tasks he performed in the 15-year period leading up to the back injury he sustained working for respondent.

The second, and probably most important, reason why claimant's task loss should be based upon all of the work tasks claimant performed during the 15-year period before his present low back injury is because the statute, K.S.A. 44-510e, so directs. Nowhere does the Workers Compensation Act provide that former work tasks should be disregarded on the basis of an earlier injury. Instead, the Act provides an employer credits for preexisting functional impairment (K.S.A. 44-501(c)) and for contributions between disabilities (K.S.A. 44-510a). As stated in *Bergstrom*,[17] when a workers compensation statute is plain and unambiguous one must give effect to its express language rather than speculate on legislative intent and what the law should or should not be.

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read

[16] Koprivica Depo. (Dec. 1, 2008) at 42, 43.

[17] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

> the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[18]

Dr. Koprivica recommended that claimant be restricted from lifting more than 70 pounds on a one-time basis, claimant's occasional lifting be limited to a maximum of 50 pounds, and that claimant refrain from frequent or constant lifting or carrying. In addition, the doctor recommends that claimant limit bending at the waist, pushing, pulling, twisting, and avoid frequent or constant activities where he is unable to work at his own pace. Claimant should have flexibility in sitting, standing, and walking and be able to change positions as necessary.

After reviewing the list of former work tasks prepared by claimant's vocational expert, Michael J. Dreiling, Dr. Koprivica determined claimant had lost the ability to perform 14 of the 23 work tasks, or 61 percent, that claimant performed in the 15-year period before the subject matter injury. Also, after reviewing the list of former work tasks compiled by respondent's vocational expert, Steve Benjamin, Dr. Koprivica opined claimant had lost the ability to perform 23 of the 40 nonduplicate work tasks, or 58 percent.

Dr. Smith indicated that claimant should not perform 10 of the 23 former work tasks compiled by Mr. Dreiling, or approximately 43 percent. Likewise, the doctor indicated claimant should not perform 12 of the 40 nonduplicate former work tasks compiled by Mr. Benjamin, or 30 percent. The doctor, however, noted that his opinions would have been the same in 2003, other than further restricting claimant from driving the treater truck.

The Board finds Dr. Smith's testimony regarding claimant's restrictions is not persuasive. The Board finds Dr. Koprivica's restrictions are appropriate for claimant and, therefore, his task loss should be based upon those. Accordingly, after averaging the 61 percent and 58 percent task loss opinions of Dr. Koprivica, the Board finds claimant has sustained a 60 percent task loss due to the injury he sustained working for respondent.

Post-injury employment and wage loss

Upon being terminated by respondent, claimant drew unemployment compensation for about 4 months. He then worked for Ruthie Scammey Farms in Elk City, Kansas, and earned approximately $400 per week. In that job claimant cut scrap metal with a torch. Claimant occasionally lifted up to 30 to 40 pounds, lifted up to 70 pounds about once a day on average, and he got in and out of dumpsters. Claimant estimates that he did that work for approximately 6 months, from around March through sometime in September 2008.

[18] *Id.*, Syl. ¶ 1.

Next, claimant obtained a job with Chapu Construction. When claimant testified in December 2008, he had recently obtained that job and had worked 30 or 35 hours doing a few odd jobs. He had been assured, however, that as of January 1, 2009, he would be working full-time and earning $400 per week.[19]

Claimant continued working for respondent until he was fired on May 15, 2007. Accordingly, claimant has a 100 percent wage loss from May 15, 2007, until March 1, 2008, the approximate date he began working for Scammey Farms. From March 1, 2008, through September 2008 claimant earned approximately $400 per week and, therefore, has a 67 percent wage loss for that period. The record fails to provide much detail regarding claimant's earnings after September 2008, as claimant testified he had worked 30 or 35 hours for a construction company. Claimant last testified in December 2008 that he would be earning $400 per week commencing January 1, 2009.[20] Accordingly, the Board finds claimant had an approximate 98 percent wage loss from October 1, 2008, through December 31, 2008, followed by a 67 percent wage loss.

Preexisting impairment

In March 1997 claimant had left knee surgery by a Dr. Toma. When released from medical treatment, the doctor told claimant that he could do whatever he wanted.[21] Respondent does not contend that any preexisting impairment from the left knee should be considered in determining claimant's award.

As indicated above, the parties stipulated claimant had a 25 percent whole person impairment due to his earlier injury and spinal fusion. Accordingly, as provided by K.S.A. 44-501(c) claimant's award of permanent disability benefits should be reduced by that 25 percent impairment.

CONCLUSIONS OF LAW

Because claimant's low back injury is not set forth in the schedule of K.S.A. 44-510d, his permanent partial disability benefits are governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

[19] R.H. Trans. at 77.

[20] *Id.*

[21] *Id.*, at 35.

> covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The Kansas Supreme Court in *Bergstrom*[22] stated that the language of the statute is unambiguous and, therefore, should be followed. Accordingly, the actual post-injury earnings of a worker are to be used when determining a worker's wage loss. Similarly, the statute indicates when analyzing the task loss all of a worker's former tasks should be considered as long as those tasks were performed in the 15-year period before the injury.

Averaging claimant's wage loss and task loss yields the following permanent partial disability ratings for the following periods:

> For the period from May 15, 2007, until March 1, 2008, claimant has an 80 percent permanent partial disability based upon a 100 percent wage loss and a 60 percent task loss.
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> For the period from March 1, 2008, through September 30, 2008, claimant has a 64 percent permanent partial disability based upon a 67 percent wage loss and a 60 percent task loss.
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> For the period from October 1, 2008, through December 31, 2008, claimant has a 79 percent permanent partial disability based upon a 98 percent wage loss and a 60 percent task loss.
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> Commencing January 1, 2009, claimant has a 64 percent permanent partial disability based upon a 67 percent wage loss and a 60 percent task loss.

[22] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

Finally, as indicated above, claimant's award of benefits should be reduced by his preexisting 25 percent whole person functional impairment when computing his award. Accordingly, claimant is entitled to the following permanent partial disability benefits:

55 percent for the period from May 15, 2007, until March 1, 2008;

39 percent for the period from March 1, 2008, through September 30, 2008;

54 percent for the period from October 1, 2008, through December 31, 2008; and

39 percent commencing January 1, 2009.

Should claimant's earnings change, the parties may seek review and modification under K.S.A. 44-528.

AWARD

WHEREFORE, the Board modifies the April 10, 2009, Award entered by Judge Klein.

Eric Von Kessler is granted compensation from Multi Chem Group and its insurance carrier for a repetitive trauma injury ending May 11, 2007, and the resulting disability. Based upon an average weekly wage of $1,205.25, claimant is entitled to receive the following disability benefits:

For the period from May 15, 2007, through February 29, 2008, claimant is entitled to receive 41.57 weeks of permanent partial disability benefits at $483 per week, or $20,078.31, for a 55 percent permanent partial disability.

For the period from March 1, 2008, through September 30, 2008, claimant is entitled to receive 30.57 weeks of permanent partial disability benefits at $483 per week, or $14,765.31, for a 39 percent permanent partial disability.

For the period from October 1, 2008, through December 31, 2008, claimant is entitled to receive 13.14 weeks of permanent partial disability benefits at $483 per week, or $6,346.62, for a 54 percent permanent partial disability.

Commencing January 1, 2009, claimant is entitled to receive 76.57 weeks of permanent partial disability benefits at $483 per week, or $36,983.31, for a 39 percent permanent partial disability and a total award of $78,173.55.

As of October 28, 2009, claimant is entitled to receive 128.28 weeks of permanent partial disability compensation at $483 per week in the sum of $61,959.24 for a total due and owing of $61,959.24, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $16,214.31 shall be paid at $483 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members would find the cause of claimant's current condition to be the natural progression of his preexisting degenerative disc disease. His work driving an oil field truck for respondent likely caused aggravations of his symptoms but these aggravations were temporary and were limited to his symptoms only. Those work activities neither altered claimant's underlying physical structures nor caused permanent injury or impairment. Dr. Smith's opinion is the most credible in this record and Dr. Smith opined that claimant's work with respondent did not cause damage to his lower back. Furthermore, claimant's current restrictions are essentially the same as those recommended by Dr. Smith in 2003. As claimant's restrictions remain essentially unchanged, the restrictions cannot support a finding of additional task loss or work disability. Finally, K.S.A. 44-510e(a) requires that a claimant's wage loss be "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." The majority has erroneously

computed claimant's wage loss by using a post-injury wage that claimant anticipates earning but is not actually earning.

BOARD MEMBER

BOARD MEMBER

c: John E. McKay, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge